

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.22 Malicious Use of Phone Service

Insert the following language at the end of the Note at the top of p 174, before subsection (A):

Additionally, the Court of Appeals has ruled unconstitutional (as applied to defendant) a local ordinance prohibiting persons from using “abusive or obscene” language “when such words by their very utterance inflict injury or tend to incite an immediate breach of the peace.” In *People v Pouillon*, ___ Mich App ___ (2002), the defendant entered a conditional plea of no contest to this ordinance for yelling “[t]hey kill babies in that church . . . [w]hy are you going in there?” to mothers who were dropping off their children at a day-care/pre-school operated by that church. Defendant’s statements caused the children to be “visibly frightened and upset.” He yelled these words while standing on city property, 30 feet away from a dentist’s office and 300 feet away from the church. He chose that location because the church and the dentist had either previously celebrated the anniversary for Planned Parenthood or had publicly supported the organization. The Court of Appeals, in reversing defendant’s conviction, and in finding that defendant’s statements were not “fighting words,” a category of words excluded from First Amendment protection, explained its rationale as follows:

“In this case, defendant’s words had no tendency to incite an imminent breach of the peace. Defendant’s message was in the form of grotesque exaggeration that was more likely to frighten children than to impart information. However, the children’s mere fright, though an unfortunate consequence of defendant’s speech, did not rise to the level

of violence or a disturbance of public order nor was such a result likely. If the purpose of the prohibition on ‘fighting words’ is to preserve public safety and order, then unprotected ‘fighting words’ do not encompass words that would emotionally upset children who are unlikely to retaliate. Therefore, based on the limited facts of this case, we find that the ordinance was unconstitutionally applied to defendant.” *Id.* at ____.

CHAPTER 7

General Evidence

7.14 Privileges Arising From a Marital Relationship

C. Retroactivity of Amendment to Spousal and Marital Communication Privileges

Insert the following language at the end of the first full paragraph on p 391:

For a recent federal case on Ex Post Facto Clause analysis, see *United States v Ristovski*, ___ F3d ___ (CA 6, 2002) (holding that an amendment to a Federal Rule of Criminal Procedure, which decreased the time in which defendants can file motions for new trials on the basis of newly discovered evidence, is procedural in nature and may be applied retroactively without violating the Ex Post Facto Clause).

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.6 Concurrent Criminal and Civil Proceedings

B. The Victim's Use of Judgments or Orders From Criminal or Juvenile Proceedings as Evidence in Civil Actions

Insert the following language at the end of the “Collateral Estoppel” discussion on p 505:

For a case holding that the collateral estoppel doctrine does not bar a plaintiff in a subsequent federal civil suit from relitigating the issue of probable cause as determined at the plaintiff's preliminary examination in state court, see *Hinchman v Moore*, ___ F3d ___ (CA 6, 2002) (reversing the district court's granting of defendant's motion for summary judgment precluding plaintiff from relitigating the issue of probable cause in her civil suit for malicious prosecution, false arrest, and false imprisonment, where the claim was based on a police officer's providing false information to support the probable cause determination).

For a detailed discussion of the doctrines of collateral estoppel and mutuality of estoppel, and the interplay between them, see *Keywell v Bithell*, ___ Mich App ___ (2002).